In the Supreme Court of the United States

October Term, 1977
No. 76-1567

ROGER H. COMLY,

Petitioner

v.

TOWNSHIP OF LOWER SOUTHAMPTON

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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The petitioner, ROGER H. COMLY, prays that a Writ of Certiorari issue to review the judgment and order of the Supreme Court of Pennsylvania rendered in these proceedings on February 11, 1977.

THE OPINIONS BELOW

The Opinion of the Commonwealth Court of Pennsylvania is reported at Pa. Commonwealth Ct. , 365 A.2d 883, and appears herein as Appendix A. The Opinion of the Court of Common Pleas of Bucks County, Pennsylvania is reported at 28 Bucks Co. L. Rep. 319, and appears herein as Appendix B. No other written opinions have been delivered.

JURISDICTION

(i) The *per curiam* order or judgment of the Supreme Court of Pennsylvania was entered on February 11, 1977. *See* Appendix C, *infra*. This petition for certiorari was filed less than ninety (90) days from the date aforesaid.

(ii) The judgment or decree sought to be reviewed is the order of the Supreme Court of Pennsylvania, affirming petitioner's removal as a police officer by denying his petition for allowance of appeal. Because Pennsylvania Rule of Appellate Procedure 1123(b)(1) requires certification of intervening circumstances in applications for reconsideration, no such application was filed.

(iii) Jurisdiction to review the judgment or decree in question by writ of certiorari is conferred on this Court by Title 28 of the United States Code, Section 1257(3).

QUESTIONS PRESENTED

Section 812, subsection (4) of the Pennsylvania Police Tenure Act provides that a police officer may be disciplined for "conduct unbecoming an officer". The statute contains no definition of this phrase. The Pennsylvania courts have defined it as follows:

> Any conduct which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services . . . [is conduct unbecoming an officer].
>
> *Eppolito v. Bristol Borough*, 19 Pa. Commonwealth Ct. 99, 339 A.2d 653, 655 (1975);
>
> [Conduct unbecoming an officer is] . . . that which adversely affects the morale or efficiency of the bureau to which one . . . is assigned.
>
> *In Re Baker*, 409 Pa. 143, 146, 185 A.2d 521 (1962).

The statute also proscribes conduct constituting a felony or misdemeanor, but does not prohibit conduct constituting a summary offense as defined by state law. Petitioner's conduct was a summary offense.

Section 590 of the Second Class Township Code[1] makes the township board of supervisors the appointing authority of police officers. Section 814 of the Police Tenure Act empowers the appointing authority to disci-

[1] Lower Southampton Township is of the second class.

pline police officers, but only after notice has been given that charges have been filed, a written specification of them and a hearing on the merits, if requested by the person charged. Before the hearing, the power of the board of supervisors is limited to suspension of the officer subject to charges.

The questions presented are as follows:

1. Whether petitioner was deprived of procedural due process and denied equal protection where he was fired by his chief of police, without notice of charges and without the knowledge or approval of the appointing authority; where the appointing authority thereafter removed him without notice that charges had been filed, without hearing and at a meeting of which petitioner was given no notice, which removal was made retroactive to the effective date of the first firing; and where petitioner only *after* his unlawful removal, was given a hearing before the same board already committed to his removal as a police officer?

2. Whether a state statute that proscribes as "conduct unbecoming an officer" any act "tending to destroy public respect" or "adversely affecting police moral" and which thereby is facially capable of encompassing not only protected speech, but also protected rights of privacy, assembly and association is overbroad and repugnant to the First, Fifth and Fourteenth Amendments, as judged in relation to its plainly legitimate sweep?[2]

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[2] By appeal, pursuant to 28 U.S.C. §1257(2), filed contemporaneously herewith, the petitioner has challenged the statute as being unconstitutionally vague under the Fifth and Fourteenth Amendments.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The following provisions of the *Constitution of the United States* are involved:

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The following statutory provisions are involved:

(a) The Police Tenure Act of June 15, 1951, P.L. 586, §§2, 4; 1961, June 14, P.L. 348, §§1, 4; 1965, July 19, P.L. 219, §§1, 4 (53 P.S. §§812, 814):

§812. Removals

No person employed as a regular full time police officer in any police department of any township of the second class, or any borough or township of the first class within the scope of this act with the exception of policemen appointed for a probationary period of one year or less, shall be suspended, removed or reduced in rank except for the following reasons: (1) physical or mental disability affecting his ability to continue in service, in which case the person shall receive an honorable discharge from service; (2) neglect or violation of any official duty; (3) violating of any law which provides that such violation constitutes a misdemeanor or felony; (4) inefficiency, neglect, intemperance disobedience of orders, or conduct unbecoming an officer; (5) intoxication while on duty. A person so employed shall not be removed for religious, racial or political reasons. A written statement of any charges made

against any person so employed shall be furnished to such person within five days after the same are filed.

(1951, June 15, P.L. 586, §2; 1961, June 14, P.L. 348, §1; 1965, July 19, P.L. 219, §1.)

§814. Hearings on dismissals

If the person sought to be suspended or removed shall demand a public hearing, the demand shall be made to the appointing authority. Such person may make written answers to any charges filed against him. The appointing authority shall grant him a public hearing, which shall be held within a period of ten days from the filing of charges in writing, and written answers thereto filed within five days, and may be continued by the appointing authority for cause or at the request of the accused. At any such hearing, the person against whom the charges are made may be present in person or by counsel. The appointing authority may suspend any such person without pay pending the determination of the charges against him, but in the event the appointing authority fails to uphold the charges, then the person sought to be suspended or removed shall be reinstated with full pay for the period during which he was suspended, and no charges shall be officially recorded against his record. No order of suspension made by the appointing authority shall be for a longer period than one year.

A written record of all testimony taken at such hearings shall be filed with and preserved by the appointing authority, which record shall be sealed and

not be available for public inspection in the event the charges are dismissed.

(1951, June 15, P.L. 586, §4.)

The full text of the above statute is set out verbatim as Appendix D.

(b) The Second Class Township Code, Act of May 1, 1933, P.L. 103, art. V, §590; 1945, May 16, P.L. 601, §1; 1947, Julv 10, P.L. 1481, §7, 1949, May 20, P.L. 1562, §4; 1953, July 2, P.L. 354, §5, as amended 1965, June 29, P.L. 152, §1 (53 P.S. 65590) *as superseded and amended in part by The Police Tenure Act, supra:*

§65590. Petition for appointment of police; contracts for police services

A. Upon the petition of not less than twenty-five registered electors or taxpayers of any township, or of two or more adjacent townships, representing that the safety of the citizens and the security of property make it necessary for the appointment of one or more policemen, the supervisors of such township or townships shall consider said petition, and, if satisfied of the reasonableness and propriety of said application, shall appoint one or more registered electors, who shall be residents of the Commonwealth, to act as policemen, and to serve at the will of said supervisors.[3]

The supervisors of such township or townships shall fix the number of policemen, the compensation

[3] This statute was modified by the Police Tenure Act, *supra*, which conferred tenure upon police officers and limited removals to circumstances of cause.

of such policemen, and shall limit the term of service of said policemen as it may deem proper. Where such policemen are appointed for two or more townships, the supervisors of such township shall fix the amount of compensation which shall be paid by each of such townships. Such compensation shall be paid from the general township fund. The supervisors of the township or townships may assign any policeman, with his consent, to undergo a course of training at any training school for policemen established and made by the State or Federal Government, and may provide for the payment by the township of his expenses or a part thereof while in attendance in such training school.

B. Any township may contract with any adjacent township of the first or second class, or with any borough or city, and may expend moneys from the general fund for the purpose of securing the services within the township of the police of such adjacent township, borough or city. When any such contract has been entered into, the police of the employing township, borough or city shall have all the powers and authority conferred by law on township police in the territory of the township which has contracted to secure such police service.

STATEMENT OF THE CASE

Roger H. Comly, petitioner, is a citizen of the United States and a resident of Bucks County, Pennsylvania. At all times relevant hereto, petitioner was a tenured police officer employed by the Township of Lower Southampton, Bucks County, Pennsylvania.

On November 9, 1975, petitioner shot a deer out of season outside of his township, while off-duty, out of uniform and engaged in recreational activity on a farm. On November 10, 1975, petitioner advised his superior, the chief of police, of this summary violation (R. 19a).[4] The chief of police, knowing that petitioner's hunting license previously had been suspended (R. 55a), specifically advised him that the summary offense would not effect his employment (R. 19a).

On November 19, 1975, without consulting or filing charges with the township board of supervisors, the police chief dismissed Officer Comly (R. 22a). By letter dated November 20, 1975, the police chief requested the board of supervisors' chairman to "remove Roger H. Comly, *former* member of the Lower Southampton Police Department, from the payroll of Lower Southampton Township, effective date of removal November 19, 1975" (R. 69a, *emphasis added*). The chief testified before the Court

[4] R. references are to the reproduced record filed by petitioner in the Commonwealth Court of Pennsylvania, which has been certified and transmitted to this Court.

of Common Pleas that his intent and action of November 19, 1975, was removal of petitioner from the police force pursuant to his authority under the Police Tenure Act (R. 86a). Also on November 20, 1975, the Chief mailed a letter to petitioner confirming that "[y]ou are dismissed for the reasons of conduct unbecoming an officer," effective November 19, 1975 (R. 69a). This letter contained charges relative to game violations committed by the officer; it contained no notice that charges had been filed with the board of supervisors. The Chief's letter to the board of supervisors neither preferred nor referred to any charges.

If formal charges ever were filed with the Board of Supervisors, petitioner was not given notice of same. Instead, the board of supervisors, without notice to the officer, or a specification of charges, considered his removal at a meeting held on November 25, 1975. Petitioner's first notice that charges may have been filed with the appointing authority, or that charges were under its consideration, came after the meeting, by a letter dated November 26th, notifying him that his removal was retroactive to November 20th, or five (5) days prior to the board's consideration of the matter (R. 78a). This letter contained neither reference to nor specification of charges. That the board considered its action of November 25, 1975 as conclusive of the merits is evidenced by its notification that petitioner could "appeal" (R. 78a).

On December 5, 1975, a hearing was held before the board. Petitioner first raised the denial of procedural due process at the commencement of this hearing by asserting his right to notice of the charges and asserting the

illegality of the prior removals (R. 5a-10a). When the board discovered that it had not specified any charges against the officer, nor given notice of same, it moved to adopt those mentioned by the chief of police in this letter to petitioner dated November 20th. At the conclusion of this hearing, the board resolved "that the Chief's recommendation to have Officer Comly dismissed for the reasons given be supported" (R. 66a). This action was taken without any discussion or deliberation concerning whether the officer's actions constituted "conduct unbecoming an officer" or the propriety, under the circumstances, of the drastic penalty of removal.

Pursuant to section 815 of the Police Tenure Act, petitioner appealed to the Court of Common Pleas of Bucks County for reinstatement. In his appeal, petitioner again asserted the denial of his due process rights as set forth in the statute, alleging the lack of notice, the illegality of the police chief's action, the unlawfulness of the board of supervisors *ex parte* action and the inherent prejudice of the board hearing (R. 72a). In its opinion affirming petitioner's dismissal, the Court of Common Pleas treated these questions with uncharacteristic caprice:

> We are totally unimpressed with the procedural arguments advanced by appellant. Although technically perhaps the statement of charges should have been given him by the Board of Supervisors rather than the police chief, the police chief did give him a full and complete written statement of the charges against him together with all of the applicable provisions of the law . . . and we consider that these were adopted by the Board of Supervisors in its letter to him [petitioner] written over the signature of the Chairman of November 26, 1975 . . .
>
> Appendix B, *infra* at 10a, 11a.

The lower court's opinion did not address the due process implications of the prior unlawful dismissals by the chief of police and the board of supervisors; nor did it explain its conclusion that the chief's charges were adopted by the letter of November 26, 1975, which contained no reference to charges and constituted an *ex officio* and *ex parte* removal without prior notice to petitioner.

Petitioner's appeal also raised the question whether Section 812 of the Police Tenure Act is unconstitutional under the First, Fifth and Fourteenth Amendments (R. 74a). Although the First Amendment contention was briefed at length (T.B. at 4, 21-25),[5] the Court of Common Pleas limited its summary dismissal of the contention to the Fifth Amendment vagueness issue:

> Appellant has challenged the standard of "conduct unbecoming an officer" as being unconstitutional for vagueness under the due process provisions of the United States Constitution. Appellant makes this contention in the face of *Faust v. Police Civil Service Commission of Borough of State College*, [22 Pa.] Commonwealth Ct. [123], 347 A.2d 765 (1975) which he acknowledges and which holds to the contrary but based upon argument that this case is bad law and should not be followed. Obviously,

[5] T.B. references are to the petitioner's brief filed in the trial court, Court of Common Pleas, which has been certified and transmitted to this Court.

that is an argument which may not be dignified in this Court, it being an opinion by an appellate court of this Commonwealth which is binding on this court.

(R. 114a); Appendix B, *infra*, at 11a.

An appeal of the lower court's opinion and order were filed in the Commonwealth Court of Pennsylvania, again specifically raising whether the statute's proscription of "conduct unbecoming an officer" is unconstitutional under the First, Fifth and Fourteenth Amendments to the Constitution of the United States as well as the due process questions (A.B. 2, 1-20, 24-29, 34-42).[6] The Commonwealth Court affirmed "on the opinion of Judge Garb written for the Court of Common Pleas . . ." (Appendix A, *infra*). From the opinion and order of the Commonwealth Court of Pennsylvania, petitioner filed Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, again raising the constitutional questions (P.A. 11).[7] This petition was denied *per curiam mem.* on February 11, 1977. Because Pennsylvania Rule of Civil Procedure 1123(b) (1) requires that applications for reconsideration must be based upon "intervening circumstances", which do not exist in this case, no application for reconsideration was filed.

The grounds upon which appellant was dismissed for "conduct unbecoming an officer" related to his commission of a game law violation while off-duty, out of uniform and outside of his township, on November 9, 1975. This game law violation is a summary offense under Pennsylvania law.[8]

[6] A.B. references are to the appellant's brief filed in the Commonwealth Court of Pennsylvania, which has been certified and transmitted as part of the record to this Court.

[7] P.A. references are to the Petition for Allowance of Appeal which was filed in the Supreme Court of Pennsylvania and which has been certified and transmitted to this Court.

Because Section 812, subsection (3) of the Police Tenure Act provides that no tenured police officer shall be suspended, removed or reduced in rank except for the "violating of any law which provides that such violation constitutes a misdemeanor or felony", the appellee proceeded under subsection (4) of the Act, which proscribes "conduct unbecoming an officer".

All state courts denied petitioner's expressed contentions that Section 812 of the Police Tenure Act is vague, overbroad and repugnant to the First, Fifth and Fourteenth Amendments. The state courts likewise rejected *sub silentio* the petitioner's assertion that he was denied procedural due process when the constitutionally sufficient procedures set forth in Section 814 were not applied to his case.

[8] Summary cases in Pennsylvania are those in which the issuing authority or district justice exercises original jurisdiction. Pennsylvania Rule of Criminal Procedure 3(p). Enforcement of game violations in Pennsylvania is by summary proceedings. *See and compare* Act of June 3, 1937, P.L. 1224, Art. XII, §1202; 1949, April 18, P.L. 494, §1; 1949, April 18, P.L. 509, §1; 1957, May 17, P.L. 144, §1; 1959, Sept. 11, P.L. 879, §1 (34 P.S. §1311.1202), *as suspended and superseded by and with* Pa. R. Crim. P. 29.

REASONS FOR GRANTING THE WRIT

I.

Because the Procedures Embodied in the Police Tenure Act Create an Expectancy of Job Retention Until After a Pretermination Hearing, Petitioner's Discharge Before the Hearing Denied Him Due Process and Violated the Fifth and Fourteenth Amendments

Because the decisions of the Courts below directly conflict with settled due process principles as enunciated by this Court, special and important reasons compel review. In *Arnett v. Kennedy*, 416 U.S. 134, 40 L.Ed 2d 15, 94 S. Ct. 1933 (1974), this Court held that while nonprobationary employees have a substantive right under tenure statutes, whenever such right is "inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet". Unlike Kennedy, the petitioner at bar does not assert that the procedures outlined by the Police Tenure Act are inadequate under the constitution; rather, he asserts the denial of due process because the procedures inextricably intertwined with and afforded by the statute were not applied to his case.

Section 812 of the act provides that a written statement of any charges made against any person shall be furnished to such person within five days after the same are

filed. Section 814 mandates that a public hearing shall be granted before the appointing authority upon demand by the person charged; pending this hearing, the appointing authority may suspend the officer without pay. Pennsylvania case law has interpreted these procedural provisions to be mandatory, its remedies to be exclusive and requires that it be strictly pursued and construed. *E.g., Gardner v. Repasky*, 434 Pa. 126, 252 A.2d 704 (1969); *Kretzler v. Ohio Township*, 14 Pa. Commonwealth Ct. 236, 322 A.2d 157 (1974); *In Re Scott Township Civil Service Commission*, 166 Pa. Superior Ct. 486, 493 (1950).

The obvious purpose of these procedural rules is to afford one notice that the appointing authority—the board of supervisors—is considering charges and to guarantee hearing before a final determination thereof. *Compare Arnett v. Kennedy, supra, with Gardner v. Repasky, supra, and Kretzler v. Ohio Township, supra.* Such procedural guarantees, if properly applied, meet the requirements of the Fifth and Fourteenth Amendments. *See Arnett v. Kennedy, supra; Morrissey v. Brewer*, 408 U.S. 471, 33 L.Ed. 2d 484, 92 S.Ct. 2593 (1972); *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed. 2d 556, 92 S.Ct. 1983 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed. 2d 548, 92 S.Ct. 2701 (1972); *Perry v. Sindermann*, 408 U.S. 593, 33 L.Ed. 2d 570, 92 S.Ct. 2694 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed. 2d 287, 90 S.Ct. 1011 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L.Ed. 2d 349, 89 S.Ct. 1820 (1969). However, in the instant case, petitioner was discharged without the benefit of these due process procedures; he was denied both the bitter and the sweet.

Petitioner had a statutory expectancy that he would not be removed other than for cause such as "conduct unbecoming an officer"; he possessed a statutory expectancy that he would not be removed except by the "appointing authority", after notice that charges had been filed with it and after hearing, if demanded; he also held a statutory expectancy that, pending the hearing, he could only be suspended, but not discharged. These expectations affect property interests created by the state and thereby entitle petitioner to constitutional protection. *Arnett v. Kennedy, supra,* at U.S. 151-154, 40 L.Ed. 2d 31-33; *Board of Regents v. Roth, supra; Perry v. Sindermann, supra.*

All of petitioner's procedural rights were violated. First, petitioner was denied due process when fired by the chief of police on November 19, 1975, in contravention of the statutory guarantee that such action may be taken only by the appointing authority—the board of supervisors—after notice and hearing. Second, the discharge of petitioner by the board of supervisors after a meeting held between it and the chief of police on November 26, 1975, without notice to petitioner, contravened the promise of prior notice and hearing as well as the expectation that a final taking could not occur pending a public hearing.[9] Third, the board's order, formalized by the letter of November 26, 1975, which made the removal retroactive to a date five days before its *ex parte* meeting, ratified and enforced the illegal action of the chief of police, thereby again violating the statutory scheme of procedural protec-

[9] There is no doubt that the "final taking" occurred before the hearing. Petitioner's removal was made retroactive to November 20, 1975. The petitioner was paid only until November 19, 1975.

tion. Finally, the hearing of December 5, 1975, was granted only after the petitioner's discharge and subsequent to the board's resolution and commitment to remove him. Because the board considered it to be an "appeal", rather than a hearing for "determination of the charges against him", petitioner was deprived of the pretermination hearing before an impartial fact finder as mandated by the statute. This case accordingly presents the important question not reached in *Gibson v. Berryhill,* 411 U.S. 564, 36 L.Ed. 2d 488, 93 S.Ct. 1689 (1973), concerning whether prejudgment of the facts by an administrative agency denies one due process of law. 411 U.S. 564, 579, 36 L.Ed. 2d 500. In this case, "the Board members had some . . . official stake in the decision" because they already had discharged petitioner without due process. *Hortonville Joint School District v. Hortonville Education Association,* U.S. , 49 L.Ed. 2d 1, 96 S.Ct. 2308, 2314 (1976). This case is not one in which the board merely had some prior official involvement or about which it merely had taken a public position; it had prejudged the facts and had committed itself to the discharge before the hearing. *Accord Olshock v. Skokie,* 541 F.2d 1254 (7th Cir. 1976). Previously committed to removal, the board could not make an objective determination of either the charges or the penalty to be imposed,[10] which constitutes a denial of due process.

[10] At all stages below, petitioner offered to prove that fellow officers who had committed felonies and misdemeanors while on duty and in uniform had received a penalty less than dismissal. It was and is petitioner's contention that under such circumstances his dismissal constitutes a denial of equal protection. As in *Olshock v. Skokie, supra,* the function of the township board is to determine the penalty as well as the merits of the case. Where

See Hortonville Joint School District v. Hortonville Education Association, supra; Gibson v. Berryhill, supra. The mere fact that appeal is granted of the board's decision to the Court of Common Pleas does not cure the error. *Ward v. Village of Monroeville,* 409 U.S. 57, 34 L.Ed. 2d 267, 93 S.Ct. 80 (1972).

The instant case presents an important due process question in the classical sense.[11] Unlike Kennedy in *Arnett,* the petitioner at bar does not challenge the constitutional sufficiency of the established statutory procedures. Rather, he asserts the denial of due process by the arbitrary and capricious deprivation of a property right without adherence to processes and procedures afforded by the statute and of which he had a reasonable expectancy. The township's requirement that petitioner adhere to its *post facto* and subjective determination of "conduct unbecoming an officer" was not accompanied by any compunction for failing to proceed according to "the law of the land".

The Supreme Court of Pennsylvania, by its judgment *per curiam mem.*, affirming the lower court opin-

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such function rests with a biased or prejudiced board, a denial of due process results. *Olshock v. Skokie, supra,* at 1258; *see also Tumey v. Ohio,* 73 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437 (1927).

[11] " 'For the true sense and exposition of these words,' says Lord Coke (2 Inst. 50), 'see the statute of 37 Eliz. cap. 8, where the words *by the law of the land* are rendered, *without due process of law.*' The amendments to the constitution of the United States use the language, 'nor be deprived of life, liberty, or property, without due process of law.' And Judge Story observes that 'this clause in effect affirms the right of trial according to the process and proceedings of the common law.' (3 Story on the Const. 661)." 1 Blackstone's Commentaries 123, n. 59 (Lewis ed. 1898).

ions and orders, sanctioned a classical violation of the right to due process, which petitioner had asserted consistently in all state courts. Insofar as state law requires prior notice and a pretermination hearing for police officers subject to discipline *(Gardner v. Repasky, supra; Kretzler v. Ohio Township, supra),* the state courts' refusal to reinstate petitioner constitutes a Fourteenth Amendment denial of equal protection as well as Fifth and Fourteenth Amendment denials of due process. "An act which contravenes the equal protection guaranty because it is based upon arbitrary discrimination is one that is also violative of the guaranty of due process." B. Schwartz, *A Commentary on the Constitution of the United States,* Part III, Vol. II, 495, 496 (1968).

The willingness of the Pennsylvania judiciary to arbitrarily sanction divergence by municipal bodies from statutorily created and constitutionally protected procedures and processes in the adjudication of police discharge cases underscores the importance of the constitutional problem as well as the need for further elaboration and direction of the guiding principles by this Court.

II.

A. Because There Exists a Considerable Dichotomy of Thought as to Whether a Litigant Whose Conduct Is Noncommunicative May Raise a First Amendment Overbreadth Facial Attack Upon a Statute, This Court Should Hear and Decide This Issue

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By appeal filed contemporaneously herewith, petitioner seeks reinstatement by challenge to the constitution-

ality of the Police Tenure Act upon grounds that it is so vague that its application to him constitutes a denial of due process under the Fifth and Fourteenth Amendments. By this petition, a facial attack is made upon the statute by reason of its overbreadth.

While petitioner's conduct concededly was noncommunicative, this Court consistently has held that when a statute is capable of reaching expression sheltered by the First Amendment, there is no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute with the requisite narrow specificity. *Bigelow v. Virginia,* 421 U.S. 809, 44 L. Ed. 2d 600, 95 S.Ct. 2222 (1975); *Parker v. Levy,* 417 U.S. 733, 41 L.Ed. 2d 439, 94 S.Ct. 2547 (1974); *Broadrick v. Oklahoma,* 413 U.S. 601, 612, 37 L.Ed. 2d 830, 93 S.Ct. 2908 (1973); *Gooding v. Wilson,* 405 U.S. 518, 520, 31 L.Ed. 2d 408, 92 S.Ct. 1103 (1972); *Dombrowski v. Pfister,* 380 U.S. 479, 14 L.Ed. 2d 22, 85 S.Ct. 1116 (1965); *Bouie v. Columbia,* 378 U.S. 347, 12 L. Ed. 2d 894, 84 S.Ct. 1697 (1964).

Whether appellant maintains standing to raise the overbreadth and facial constitutionality of the statute presents itself as an important question because of a subsisting dichotomy of thought regarding the meaning and application of the rule. *See, e.g., Arnett v. Kennedy,* 416 U.S. 134, 239, 40 L.Ed. 2d 15, 76, 94 S.Ct. 1633 (1974) (dissent). Unlike *Arnett v. Kennedy,* the Pennsylvania legislature, in enacting the Police Tenure Act, was not confronted with the task of laying down a standard "in order to give myriad different . . . employees performing widely disparate tasks a common standard of job performance". 416 U.S. 159, 40 L.Ed. 2d 36. On the contrary,

its function related to laying down a comprehensible standard of conduct for policemen in performing common tasks under similar circumstances. Likewise, no Pennsylvania agency provides guidance to policemen in interpreting the act as in *Arnett* or *CSC v. Letter Carriers,* 414 U.S. 548, 578-579, 37 L.Ed. 2d 796, 93 S.Ct. 2880 (1973). Absent these conditions, the pivotal issue remains whether petitioner may raise a facial attack on the statute's overbreadth when it is admitted that his conduct was not immune under the First Amendment.

It is submitted that petitioner has standing to assert the statute's overbreadth. The heart of the overbreadth principle is that overbroad statutes inherently possess a potential deterrent effect on constitutionally protected speech; the focus of the doctrine is not on the individual before the court, but on others who may forego protected activity rather than risk the loss of property rights. *Arnett v. Kennedy, supra* at U.S. 229, 40 L.Ed. 2d 76, 77 (dissent); *Gooding v. Wilson, supra* at U.S. 521, 31 L.Ed. 2d 413; *Dombrowski v. Pfister, supra* at U.S. 486, 14 L.Ed. 2d 28. This rule always has been recognized as a judicially fashioned exception to the usual rules governing standing based upon the fundamental proposition that First Amendment issues warrant exceptional consideration.

However, in *Herzbrun v. Milwaukee County,* 501 F. 2d 1189, 1197 (7th Cir. 1974), Mr. Justice Stevens, then of the Court of Appeals, registered his dissent to the majority's holding that the plaintiff, whose conduct was noncommunicative, had standing to challenge the overbreadth of the subject statute. *Id.* Mr. Justice Stevens based the

conclusion that one whose conduct is noncommunicative lacks standing to challenge the overbreadth of a statute upon language in *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 37 L.Ed. 2d 830, 93 S.Ct. 2908 (1973), that "there comes a point where the effect [upon protected speech] —at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing against conduct that is admittedly within its power to proscribe." *Id.* at U.S. 615, 37 L.Ed. 2d 842. However, a reading of *Broadrick* reveals that the above language does not preclude standing to raise the overbreadth issue; rather, it sets forth the standard of scrutiny under which the statute is to be substantively judged after the facial attack has commenced:

> To put the matter another way, particularly where conduct and not merely speech is involved, we believed that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.
>
> *Id.*

It accordingly is asserted that cases involving noncommunicative conduct support standing to challenge a statute as overbroad; however, where an actor's conduct is not privileged, the petitioner's burden is to show that facial invalidation is required because the overbreadth is real and substantial even judging the statute in terms of its plainly legitimate sweep. This interpretation was adopted by this Court in *Parker v. Levy,* 417 U.S. 733, 760, 41 L.Ed. 2d 439, 460, 94 S.Ct. 2547 (1974) (Mr. Justice Rehnquist), although the appellee there failed in his burden of proof because "extension of standing in

First Amendment cases involving civilian society, must be accorded a good deal less weight in the military context." 417 U.S. 760, 41 L.Ed. 2d 460. The instant case presents this issue in the civilian context. Because of the dichotomy of thought regarding the standing issue, as evidenced in *Arnett* and *Herzbrun,* it is submitted that an important and special federal question is presented, requiring reiteration and explication by this Court.

B. Because the Statute's Proscription and State Courts' Definition of "Conduct Unbecoming An Officer" Is Capable of Reaching Protected Speech, Privacy, Assembly and Association, It Is Overbroad Even as Judged in Relation to Its Legitimate Sweep

---

Even judging the statute in terms of its plainly legitimate sweep, it does not meet the standards of definiteness and specificity required by the First, Fifth and Fourteenth Amendments. The most limited construction given it by the state courts states that conduct unbecoming an officer is that which has a tendency to destroy public respect for municipal employees and confidence in municipal services or which adversely affects the morale of the department. Off-duty conduct, unrelated to job performance, engaged in while out of uniform, whether legal or illegal, moral or immoral, privileged or unprivileged, falls within the ambit of the proscription. If a police officer were to own an interest in a drive-in movie showing films containing nudity, he can be dismissed under the act if the appointing authority subsequently announces that such conduct has the "tendency to destroy public respect for municipal

employees." This Court has ruled such proscriptions invalid for their overbreadth. *Erzoznick v. City of Jacksonville,* 422 U.S. 205, 45 L.Ed. 2d 125, 95 S.Ct. 2268 (1975). Were a police officer in Pennsylvania publicly to express an opinion or to picket supporting legal abortions, or associate himself with a pro-abortion organization, a fact finder can reach the *post facto* decision that such association, expression or assembly affected the morale of his anti-abortion fellows in the department. *But see Bigelow v. Virginia,* 421 U.S. 809, 44 L.Ed. 2d 600, 95 S.Ct. 2222 (1975). Punishment could inure were an officer to wear a small cloth version of the American flag on his trousers, even though the officer were off-duty, out of uniform, outside the employing municipality and engaged in recreation. *But see and compare Smith v. Goquen,* 415 U.S. 566, 39 L.Ed. 2d 605, 94 S.Ct. 1242 (1974).

The constitutional flaw of the statute is that it sets forth no standard of proscribed conduct; it is unlimited in its application.[12] The Police Tenure Act is couched in terms of putative results, as opposed to the conduct involved, which is repugnant to constitutional principles enunciated by this Court. *Lanzetta v. New Jersey,* 306 U.S. 451, 458, 83 L.Ed. 888, 59 S.Ct. 665 (1948). As the above examples expose, the proscription is not only capable of encompassing protected speech, but rights of

[12] Examples of the definition's overreach superabound. It might well "affect the morale of a police department" if an officer were to advise a criminal defendant that his legal rights had been infringed and refer him to a particularly able defense attorney. *Compare N.A.A.C.P. v. Button,* 371 U.S. 415, 9 L.Ed. 2d 405, 83 S.Ct. 328 (1963).

association and assembly protected by the First Amendment. Such statutes violate the First, Fifth and Fourteenth Amendments and are constitutionally repugnant on their face. *Erzoznick v. City of Jacksonville, supra; Bigelow v. Virginia, supra; Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469, 43 L.Ed. 2d 328, 95 S.Ct. 1029 (1975); *Broadrick v. Oklahoma, supra; Smith v. Goquen, supra.*

An evaluation of the statute's plainly legitimate sweep does not promote its constitutional viability. It is important to reiterate that the Police Tenure Act was not designed to give "myriad different . . . employees performing widely disparate tasks a common standard of job performance", *Arnett v. Kennedy, supra* at U.S. 159, 40 L. Ed. 2d 36; this statute only applies to Pennsylvania police officers having over one (1) year experience and performing similar functions under common statutory organizational patterns and common circumstances. Second, this case does not involve those "factors differentiating military society from civilian society". *Parker v. Levy, supra* at U.S. 756. The instant case is in the civilian context and involves recognized property interests sufficient to invoke constitutional protection. *Arnett v. Kennedy, supra; see also Bishop v. Wood,* 426 U.S. 341, 48 L.Ed. 2d 684, 96 S.Ct. 2074 (1976). Police officers, like all other persons, are entitled to the benefit of constitutional protection. *Uniformed Sanitation Men Association v. Commissioner,* 392 U.S. 280, 285, 20 L.Ed. 2d 1089, 1093, 88 S.Ct. 1917 (1968). Furthermore, no agency of Pennsylvania makes available advice to police officers as to its application or scope, as considered significant in *Parker v. Levy.*

The statute's proscription of "conduct unbecoming an officer" in terms so unlimited and broad has no rational basis for three (3) reasons: (a) other subsections of Section 812 specifically proscribe most conduct within the statute's legitimate sweep; (b) the phrase "conduct unbecoming an officer" is capable of much greater limitation, thereby rendering the overbreadth unnecessary and irrational; and (c) a remedy to the statute's overbreadth is obtainable by providing limiting examples of its application to possibly privileged activity.

Aside from prohibiting "conduct unbecoming an officer", Section 812 proscribes the following conduct: neglect or violation of any official duty; violating any law which provides that such violation constitutes a misdemeanor or felony; inefficiency, neglect, intemperance, disobedience of orders; and intoxication while on duty. Because of these specific proscriptions, the necessity for the prohibition of "conduct unbecoming an officer" is limited; the legitimate sweep of the statute, by reason of these specific prohibitions, is narrow in terms of necessity. By contrast, the overbreadth is real and substantial.

Because the statute's explication easily is susceptible to greater precision, its legitimate sweep is further condensed. One of the statute's major faults is that it is directed at conduct performed both off and on duty and both job or performance related and unrelated. Where statutes have punished conduct directly related to duty or job performance, they have met constitutional muster even where expression, ostensibly privileged, was involved. *See, e.g., Arnett v. Kennedy, supra* (employee falsely accusing superior of wrongdoing); *Herzbrun v. Milwaukee County, supra* (welfare department employees disrupted communication system in welfare office). However,

Pennsylvania case law specifically punishes off duty conduct, even in cases where the right to privacy is alleged, and permits the existence of rumors in the community to suffice as proof that the conduct tends to destroy public respect. *See, e.g., Faust v. Police Civil Service Commission of Borough of State College,* 22 Pa. Commonwealth Ct. 123, 347 A.2d 765 (1975), *allocatur refused mem.* A constitutional limitation upon the statute's applicability merely requires that the conduct involved relate to duty, performance or employment functions where the same otherwise would be constitutionally privileged. If the conduct involved is unrelated to duty or performance and occurs off duty and out of uniform, the overbreadth of the statute would be cured by requiring that dishonesty or moral turpitude be involved before it becomes punishable. Statutes proscribing acts of moral turpitude meet First Amendment requirements. *See Winters v. New York,* 333 U.S. 507, 515, 92 L.Ed. 841, 849 (1947). Considering the myriad of permissible limitations available to the state that would preserve the statute's legitimate sweep, no legitimate state interest is served by the existing definition.

Considering the multitude of methods available to the state and its judicial branches for limiting the proscription, the alleged state interest in a real and substantially overbroad statute is gossamer. This Court has approved regulations which contain limiting examples of its application (*Parker v. Levy, supra*), as well as procedures designed to provide advice to governmental employees regarding a proscription's applicability *(Arnett v. Kennedy, supra)*. These facilities negate the assertion that a general standard is necessitated; and it refutes any rational claim of legitimate state interest in an overbroad standard.

The Pennsylvania legislature and judiciary has failed in their constitutional responsibility to meet the guidelines set forth by this Court. It is asserted that this departure presents important and special reasons for this Court's review of the case at bar.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Pennsylvania.

Respectfully submitted,
MARTIN J. KING,
Counsel for Petitioner

27 South State Street
Newtown, Bucks County, Pennsylvania 18900

CERTIFICATE OF SERVICE

I, Martin J. King, Attorney for Appellant, do hereby certify that three copies of Appellant's Petition for Writ of Certiorari and Appendix were served by United States mail, postage prepaid, first class, on May 6, 1977 addressed to Marcel Groen, Esquire, Groen, Von-Rosensteil, Smolow & Burkett, Neshaminy Plaza II, Suite 105, Street Road and Bristol Pike, Cornwells Heights, PA 19020. I further certify that all parties required to be served in this appeal have been served.

Martin J. King
MARTIN J. KING
Attorney for Appellant

APPENDIX A

OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA

COMLY v. LOWER SOUTHAMPTON TOWNSHIP

[Cite as Pa. Cmwlth., 365 A.2d 833]

Roger H. Comly, Appellant,

v.

Lower Southampton Township,
Appellee.
Commonwealth Court of Pennsylvania

Argued Oct. 7, 1976.

Decided Nov. 22, 1976.

A dismissed township police officer appealed his dismissal to the Court of Common Pleas, Bucks County, Issac S. Garb, J., which affirmed the dismissal. The dismissed officer again appealed. The Commonwealth Court, No. 802 C.D. 1976, Mencer, J., held that dismissal for conduct allegedly unbecoming an officer, following his conviction for violation of various game laws, would be affirmed.

Order affirmed.

Dismissal of township police officer for conduct allegedly unbecoming officer, following his conviction for violation of various game laws, was affirmed.

Appendix A

Martin J. King, Cordes & King, Newtown, for appellant.

Marcel L. Groen, Groen, Von Rosenstiel, Smolow & Burkett, Cornwells Heights, for appellee.

Before Mencer, Rogers and Blatt, JJ.

MENCER, Judge.

Roger H. Comly (Comly) was a police officer for the Township of Lower Southampton in Bucks County. He was dismissed from that position for conduct allegedly unbecoming an officer. Comly had violated various game laws of the Commonwealth for which he had been convicted, including shooting and possession of a deer out of season and hunting and shooting a deer when his license was suspended for violation of the game laws.

Comly appealed his dismissal from the township police department to the Court of Common Pleas of Bucks County. That court affirmed the dismissal of Comly and this appeal followed. We affirm on the opinion of Judge Garb written for the Court of Common Pleas of Bucks County and reported at 28 Bucks Co. L. Rep. 319 (1976).

ORDER

Now, this 22nd day of November, 1976, the order of the Court of Common Pleas of Bucks County affirming the dismissal of Roger H. Comly is affirmed.

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Appendix B

APPENDIX B

OPINION OF THE COURT OF COMMON PLEAS OF BUCKS COUNTY

[28 Bucks County Law Reporter 319]

COMLY v. LOWER SOUTHAMPTON TOWNSHIP

Appeal and error—Removal of policemen—Act of July 19, 1965, P.L. 219, §1, 53 P.S. 812—Conduct unbecoming an officer—Violation of Pennsylvania game laws—Scope of review—Held, appeal dismissed.

1. On an appeal by a dismissed police officer to the Court of Common Pleas the Court may take additional testimony and find for itself the facts necessary to a just determination of the controversy and, in order for the Court to justify a dismissal for conduct unbecoming an officer, evidence must be clear and convincing.

2. Conduct unbecoming an officer has been defined as being any conduct which has a tendency to destroy public respect for municipal employes and confidence in the operation of municipal services and violations of the Pennsylvania game laws fit within the purview of that definition.

3. Off-duty conduct when the officer is out of uniform and out of his own police department's jurisdiction may properly be considered in a charge of conduct unbecoming an officer.

Appendix B

C. P. Bucks County, Civil Action—Law, No. 75-12015-05-6. Roger H. Comly v. Lower Southampton Township.

Wayne N. Cordes, of Cordes & King, for appellant.

Marcel L. Groen, of Simons, Kashkashian, Kellis & Green, for appellee.

GARB, J., April 13, 1976.

This is an appeal by the petitioner herein, a police officer for the Township of Lower Southampton, Bucks County, Pennsylvania, from the action of the Board of Supervisors of the said Township dismissing him as a police officer, which appeal is taken under and pursuant to the provision of the Act of June 15, 1951, P.L. 586, §5, 53 P.S. 815. He was removed following a hearing

held before the Board of Township Supervisors on December 5, 1975, the proceedings at said hearing having been transcribed, at the request and suggestion of the Chief of Police of the Township, all of which was done pursuant to the Act of July 19, 1965, P.L. 219, §1, 53 P.S. 812. The reason for the dismissal was conduct unbecoming an officer, one of the reasons set forth for dismissal or removal under the foregoing Act of Assembly. Pursuant to the foregoing appeal from the decision of the Board of Township Supervisors, a hearing was held before the undersigned on March 23, 1976 and following that hearing we hereby affirm the decision of the Board.

On November 19, 1975 the Chief of Police summoned the appellant to his office and at that time advised

Appendix B

the appellant that he was being dismissed from the police department for conduct unbecoming an officer. On November 20, 1975 the Chief gave to the appellant a letter setting forth the applicable provisions of the Act of Assembly under which the dismissal or removal was being made, setting forth therein the revelant provisions of the Acts of Assembly having to do with rights to hearings before the Board of Supervisors, appeal, a statement of the reasons for the dismissal, to wit, conduct unbecoming an officer, and the specification of the appellant's alleged activities giving rise to that conduct. The reasons set forth therein were that appellant had violated various of the game laws of the Commonwealth of Pennsylvania for which he had been convicted, including shooting of a deer and possession of a deer out of season, hunting and shooting a deer when the appellant's license was suspended or revoked in violation of the game laws of the Commonwealth. The letter further contained appended thereto copies of the Game Prosecution Reports setting forth the times, dates and places of the alleged violations of the Pennsylvania game laws.

The Chief likewise furnished a statement of these charges and his decision regarding dismissal to the Board of Township Supervisors and under letter of November 26, 1975[1] the chairman of the Board of Supervisors advised the appellant that the Board had determined upon his dismissal based upon the charges of the Chief by a vote of five to nothing. The foregoing letter further advised the appellant of his right to a hearing before the Board to present evidence with regard to the action of

[1] Although the letter states that the action was taken at an executive session, the evidence reveals that it was a public meeting.

termination. The letter further advised the appellant of his right to appeal to this court should he be unsuccessful in his hearing before the Board. The appellant requested a hearing before the Board which was held as aforesaid.

At the hearing before the Board of Township Supervisors evidence was presented that he had committed two violations of the game laws in December of 1974, the first being his failure or refusal to exhibit the head of a deer which he had slain to a game officer and the second being his failure and refusal to submit his hunting license for inspection by another game officer. Both of these matters resulted in convictions of summary provisions of the game laws before two different and distinct District Justices of the Peace and as a result of those convictions fines were imposed which were paid by the appellant and from those convictions no appeals were taken. Evidence further revealed that as a result of those two convictions the Pennsylvania Game Commission revoked his hunting license for a period of five years or until the year 1980.

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Evidence before the Board of Township Supervisors at the hearing of December 5, 1975 established that in November of 1975 the appellant was charged with and convicted of killing a deer in Buckingham Township, this county, on a Sunday when hunting was prohibited and, obviously, at a time when his hunter's license was under revocation. When apprehended and confronted with these charges the appellant initially denied his culpability but subsequently admitted it and paid the appropriate fines as imposed. The facts of his apprehension and conviction of the foregoing violations of the game laws were fully

and duly established at the hearing and in fact appellant testified and admitted same. He further admitted in his own testimony, voluntarily offered, that he had committed the game law violations of December, 1974 resulting in the revocation of his license.[2] At the hearing before this court on appeal he likewise testified voluntarily and admitted the foregoing violations.

Based upon the foregoing, we are satisfied by clear and convincing evidence that the appellant had in fact violated the game laws of the Commonwealth of Pennsylvania as set forth in a specification of charges given him by the Chief and that, therefore, the action of removal taken by the Board of Supervisors was both justified and warranted.

The Act of 1951 provides for an appeal by a dismissed employee to the Court of Common Pleas but does not set forth the standards or criteria of such appeal nor the scope of review. In *Vega Appeal,* 383 Pa. 44 (1955) it was held that the Court of Common Pleas on such an appeal may take additional testimony and find for itself the facts necessary to a just determination of the controversy. The court must determine the cause as it deems proper and make its own order concerning the discharge or reinstatement of the officer. Under such circumstances, in order for the court to justify a dismissal for conduct unbecoming an officer, evidence to warrant the imposition of such a penalty ought to be clear and convincing. *Vega Appeal, ibid.* Compare *Wilson v. Warminster Township,* 28 Bucks Co. L. Rep. 162 (1976). See also *Masemer v. Bor-*

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[2] This evidence was properly admitted to demonstrate the reason for the revocation of appellant's hunting license.

ough of McSherrystown, 34 D. & C. 2d 669 (1964) wherein it was held that a full-time police officer may only be suspended or removed for causes stated in the act, in this case, *inter alia,* conduct unbecoming an officer.

Conduct unbecoming an officer has been defined as being any conduct which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services. It is not necessary that the alleged conduct be criminal in character nor that it be proved beyond a reasonable doubt. *Zeber Appeal,* 398 Pa. 35 (1959). Clearly, in this case, the conduct of the appellant of which he had been duly convicted by the appropriate authorities under the Pennsylvania game laws and which were found by clear and convincing evidence by both the Board of Township Supervisors and this court to have been committed, would fit within the purview of that definition. The Act of Assembly in 53 P.S. §812 provides the bases upon which an officer may be removed which include, *inter alia,* violation of any law which constitutes a misdemeanor or felony, or conduct unbecoming an officer. Obviously by separating these two types of conduct into separate classes, it cannot be contemplated that conduct unbecoming an officer must rise to the level of being a misdemeanor or felony. In fact, the conduct which formed the basis upon which appellant was ordered

removed by the Board of Township Supervisors constituted summary offenses under the game laws of the Commonwealth. The conduct required in order to justify removal for conduct unbecoming an officer obviously need not rise to the level of conviction or commission of a misdemeanor

or felony as was amply demonstrated by *Eppolito v. Bristol Borough,* 19 Pa. Commonwealth Ct. 99 (1975) affirming this court in sustaining the borough council in disciplining the appellant therein but in modifying the discipline imposed. See *Eppolito v. Bristol Borough,* 26 Bucks Co. L. Rep. 135 (1974).

Appellant complains that he was somehow denied the right to a due process hearing before the Board of Township Supervisors and likewise before this court when both the Board and the court refused to permit evidence that other members of the police department had committed infractions of the penal code for which they had not been disciplined. The Commonwealth Court in *Eppolito v. Bristol Borough, supra,* made short shrift of that argument in that case in the following language:

> "Nor does the fact, alleged by Eppolito that other lost or stolen plates may have been used by members of the department for surveillance activity change the result. The fact that others may have been engaged in actions similar to those of Eppolito (and, incidentally, may also be guilty of conduct unbecoming an officer), does not justify Eppolito's conduct."

Appellant's argument that the conduct for which he was being removed was committed by him at a time when he was off duty, out of uniform, and out of his own police department's jurisdiction is likewise of little moment as once again acknowledged in *Eppolito v. Bristol Borough, supra.* As noted therein:

> "Eppolito's argument that his conduct was personal action, performed out of uniform and off duty,

is not persuasive. Off duty conduct may properly be considered in a charge of conduct unbecoming an officer."

The comment of Judge Rufe of this court in the Eppolito case as adopted by the Commonwealth Court in its opinion fully and adequately summarizes our observation with regard to appellant's conduct in this case:

> " '. . . the public has every right to expect its police officers to abide by all the rules, regulations and laws that apply to all citizens. If anything, the public has a right to expect a higher standard of conduct from its law enforcement officers, certainly not a less law abiding standard as Eppolito's conduct indicated.' "

The attitude of appellant herein before the Board as reflected in his testimony to the effect that he totally failed to realize and understand this standard of conduct when he violated the game laws of Pennsylvania at a time when he was off duty, out of uniform and in another municipality totally astounds us. It fails to reflect any sensitivity on his part to the conduct expected by the citizenry at large of its public servants, and in particular its police officers, with regard to respect for the law.

We are totally unimpressed with the procedural arguments advanced by the appellant. Although technically perhaps the statement of charges should have been given him by the Board of Supervisors rather than the police chief, the police chief did give him a full and complete written statement of the charges against him together with all of the applicable provisions of the law advising him

of all of his various protections under the Act of Assembly, and we consider that these were adopted by the Board of Supervisors in its letter to him written over the signature of the Chairman of November 26, 1975. He was afforded a hearing before the Board of Township Supervisors within ten days of that letter as mandated by the Act of Assembly and we hold that that hearing was held in such a way as to protect all of his various legal rights. He was present, represented by counsel, was afforded the opportunity of cross-examining the witnesses against him and was given and accepted the right to present evidence and testify on his own behalf. Although some of the evidence technically may have been improperly received as being hearsay, inasmuch as he admitted the factual allegations of that testimony by his own testimony, we fail to perceive any respect in which he was prejudiced or any of his rights violated.

Appellant has challenged the standard of "conduct unbecoming an officer" as being unconstitutional for vagueness under the due process provisions of the United States Constitution. Appellant makes this contention in the face of *Faust v. Police Civil Service Commission of Borough of State College,* Pa. Commonwealth Ct. , 347 A.2d 765 (1975) which he acknowledges and which holds to the contrary but based upon the argument that this case is bad law and should not be followed. Obviously, that is an argument which may not be dignified in this court, it being an opinion by an appellate court of this Commonwealth which is binding on this court.

For the foregoing reasons we are satisfied and do hold that the statement of charges against him was duly

established both before the Board and before this court by clear and convincing evidence and does constitute conduct unbecoming an officer.

ORDER

AND NOW, to wit, this 13th day of April, 1976 it is hereby ordered, directed and decreed that the order of the Board of Township Supervisors of Lower Southampton Township, Bucks County, Pennsylvania is affirmed and this appeal dismissed.

By the Court
(s) Isaac. S. Garb, *J.*

APPENDIX C

PER CURIAM ORDER OF SUPREME COURT OF PENNSYLVANIA

NO. 2812

ALLOCATUR DOCKET
Filed In
Supreme Court
Dec 6 1976
Eastern
District

2-11-77
Petition denied.
Per Curiam

P.A. 5521
East. Dist.

IN THE SUPREME COURT OF PENNSYLVANIA
No.

ROGER H. COMLY, PETITIONER
vs.
LOWER SOUTHAMPTON TOWNSHIP,
RESPONDENT

PETITION FOR ALLOWANCE
OF APPEAL

Appendix C

Petition for Allowance of Appeal from the Order of the Commonwealth Court of Pennsylvania, 1976 Sessions, at No. 802 C.D., dated November 22, 1976, affirming the Order of the Court of Common Pleas of Bucks County, Civil Division, 1976 Sessions, at No. 12015, dated the 13th day of April, 1976.

Martin J. King, Esq.
Attorney for Appellant
Cordes & King
27 South State Street
Newtown, Bucks County
Pennsylvania, 18940
(215) 968-2248

C-1

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Sally Mrvos
Prothonotary
Laura E. Litchard
Deputy Prothonotary

Philadelphia, 19107
February 14, 1977

Martin J. King, Esq.,
Cordes & King
27 South State Street
Newtown, Bucks County, Pa. 18940

In re: Roger H. Comly, Petitioner v. Lower Southampton Township No. 2812 Allocatur Docket

Appendix C

Dear Mr. King:

This is to advise you that the Supreme Court has entered the following Order on the Petition for Allowance of Appeal in the above-captioned matter:

"February 11, 1977

Petition Denied
Per Curiam."

An application for Reconsideration of Denial of Allowance of Appeal must be prepared in the same manner as the original petition (see Pa. R.A.P. 1111), must be confined to the grounds and must contain the certification set forth in Pa. R.A.P. 1123(b) (1) and (2), and, in order to be timely, must be received within seven days after the date of mailing of this notice.

No answer to an Application for Reconsideration of Denial of Petition for Allowance of Appeal will be received unless requested by the Supreme Court on its own motion.

Very truly yours,
Sally Mrvos
Prothonotary
by (s) Laura E. Litchard
Laura E. Litchard
Deputy Prothonotary

LEL:mb
CC: Ronald J. Smolow, Esq.

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APPENDIX D

POLICE TENURE ACT, ACT OF JUNE 15, 1951, P.L. 568, §1 et seq.

ARTICLE IX.—REMOVAL OF POLICEMEN IN CERTAIN BOROUGHS AND TOWNSHIPS

Cross References

Public officers, see 65 P.S. §1 et seq.

§811. Application of law

This act [1] shall apply to each township of the second class, to each borough and township of the first class having a police force of less than three members and not subject to sections one thousand one hundred sixty-five through one thousand one hundred ninety of the act, approved the fourth day of May, one thousand nine hundred twenty-seven (Pamphlet Laws 519), known as "The Borough Code" [2] and their amendments, nor to sections six hundred twenty-five through six hundred fifty of the act, approved the twenty-fourth day of June, one thousand nine hundred thirty-one (Pamphlet Laws 1206), known as "The First Class Township Code", [3] and their amendments.

[1] Sections 811 to 815 of this title.

[2] Sections 46165 to 46190 of this title.

[3] Sections 55625 to 56650 of this title.

1951, June 15, P.L. 586, §1.

§812. Removals

No person employed as a regular full time police officer in any police department of any township of the second class, or any borough or township of the first class within the scope of this act [1] with the exception of policemen appointed for a probationary period of one year or less, shall be suspended, removed or reduced in rank except for the following reasons: (1) physical or mental disability affecting his ability to continue in service, in which case [2] the person shall receive an honorable discharge from service; (2) neglect or violation of any official duty; (3) violating of any law which provides that such violation constitutes a misdemeanor or felony; (4) inefficiency, neglect, intemperance, disobedience of orders, or conduct unbecoming an officer; (5) intoxication while on duty. A person so employed shall not be removed for religious, racial or political reasons. A written statement of any charges made against any person so employed shall be furnished to such person within five days after the same are filed.

1951, June 15, P.L. 586, §2; 1961, June 14, P.L. 348, §1; 1965, July 19, P.L. 219, §1.

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§813. Reduction in number of police

If, for reasons of economy or other reasons, it shall be deemed necessary by any township of the second class,

[1] Sections 811 to 815 of this title.

[2] Enrolled bill reads "cases".

or any borough or township of the first class within the scope of this act,[1] to reduce the number of paid employes of the police department, then such political subdivision shall apply the following procedure: (a) If there are any employes eligible for retirement under the terms of any retirement or pension law, then such reduction in numbers shall be made by retirement, if the party to be retired is sixty-five years of age or over; (b) If the number of paid employes in the police force eligible to retirement is sufficient to effect the necessary reduction in number, or if there are no persons eligible for retirement, or if no retirement or pension fund exists, then the reduction shall be effected by furloughing the man or men, including probationers, last appointed to said police force. Such removal shall be accomplished by furloughing in numerical order, commencing with the man last appointed, until such reduction shall have been accomplished. In the event the said police force shall again be increased, the employes furloughed shall be reinstated in the order of their seniority in the service.

1951, June 15, P.L. 586, §3.

§814. Hearings on dismissals

If the person sought to be suspended or removed shall demand a public hearing, the demand shall be made to the appointing authority. Such person may make written answers to any charges filed against him. The appointing authority shall grant him a public hearing, which shall be held within a period of ten days from the filing of charges in writing, and written answers thereto filed

[1] Sections 811 to 815 of this title

within five days, and may be continued by the appointing authority for cause or at the request of the accused. At any such hearing, the person against whom the charges are made may be present in person or by counsel. The appointing authority may suspend any such person without pay pending the determination of the charges against him, but in the event the appointing authority fails to uphold the charges, then the person sought to be suspended or removed shall be reinstated with full pay for the period during which he was suspended, and no charges shall be officially recorded against his record. No order of suspension made by the appointing authority shall be for a longer period than one year.

A written record of all testimony taken at such hearings shall be filed with and preserved by the appointing authority, which record shall be sealed and not be available for public inspection in the event the charges are dismissed.

1951, June 15, P.L. 586, §4.

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§815. Appeal

The suspended or dismissed employe shall have the right to appeal to the court of common pleas of the county in which he was employed.

1951, June 15, P.L. 586, §5.

§816. Department and appointments without proper enactments

In any case in which a township or borough to which this act applies has heretofore appointed policemen or

established a police department by lawful action of council or supervisors but not by or pursuant to an ordinance or resolution regularly enacted, such action shall be deemed to have been a valid exercise of the legislative power of the township or borough for all purposes the same as though an ordinance or resolution had been enacted, and all policemen appointed thereunder shall occupy the same status as in the case of policemen appointed under authority of an ordinance or resolution.

1951, June 15, P.L. 586, §6, added 1961, April 28, P.L. 122, §1.